

**STATE OF ILLINOIS**  
**ILLINOIS COMMERCE COMMISSION**

Illinois Commerce Commission	)	
On Its Own Motion	)	
	)	
	)	ICC Docket No. 15-0073
Investigation into the Customer	)	
Authorization Required for Access by	)	
Third Parties Other than Retail Electric	)	
Suppliers to Advanced Metering	)	
Infrastructure Interval Meter Data	)	

**REPLY BRIEF ON EXCEPTIONS OF**  
**THE PEOPLE OF THE STATE OF ILLINOIS**

Pursuant to Section 200.800 of the Rules of Practice of the Illinois Commerce Commission (“ICC” or “Commission”), 83 Ill. Adm. Code § 200.800, and according to the schedule adopted by the Administrative Law Judge on January 6, 2016, the Illinois Attorney General’s Office hereby files its Reply Brief on Exceptions (“RBOE”) on behalf of the People of the State of Illinois, by and through Lisa Madigan, Attorney General of the State of Illinois (“the People” or “AG”), in the above-captioned proceeding. In this RBOE, the People respond to exceptions filed by Commonwealth Edison Company (“ComEd”), Ameren Illinois Company (“AIC”), the Citizens Utility Board and Environmental Defense Fund (“CUB/EDF”), the Illinois Competitive Energy Association (“ICEA”), and the Mission:data Coalition (“Mission:data”).

**I. Introduction**

Although the People did not file a Brief on Exceptions, the exceptions filed by other parties in this proceeding shed light on numerous important issues that the Proposed Order acknowledges have not yet been resolved but that the People agree must be addressed before this docket can be finalized. Among the chief principles upon which the Commission’s recent

decisions were founded – and which appear to have been accepted by all parties – have been that the customer should be in control of their usage data, and that utility companies were not to be burdened with evaluating or policing third party behavior, whether that third party was a RES subject to Commission jurisdiction or a non-RES, which the Proposed Order suggests is not subject to Commission authority. Certain aspects of the Proposed Order, however, appear to sidestep those principles and it is those issues that these Reply Exceptions will specifically address.

In what has been described by several parties as a troubling development for the implementation of a data sharing process, the Proposed Order concludes that the data access authorization form that has been the subject of the instant docket is only an agreement between the customer and the utility because it is “...a form that a customer must sign for a utility to release personal data and it is not a contract between a customer and a third party, it is not, by itself, enforceable against third parties.” Proposed Order at 8. This conclusion has raised serious concerns with both ComEd and Ameren, both of which filed exceptions rejecting any role as monitors over non-RES third party entities, a designation that seems to flow from that statement. AIC BOE at 2; ComEd BOE at 3. Their positions raise concerns serious enough that the People are compelled to comment on the consequences of that statement and others in the Proposed Order should the Commission choose to adopt it.

Most of the issues raised in exceptions and to which the People now respond will directly impact how best to ensure the accountability of non-RES third parties to the customers purchasing their services. The People urge the Commission to take all necessary measures to ensure the authenticity and effectiveness of any data sharing process before the sharing of customer-specific usage information with unregulated third parties can begin, including the role

of non-RES third parties in the Green Button process. For the reasons explained below, the People urge the Commission to stay the instant proceeding until various unresolved issues – technical, procedural and jurisdictional – can be addressed, either in Docket 14-0507 or in a separate appropriate proceeding.

## **II. Reply Exceptions**

### **A. Reply to Commonwealth Edison**

ComEd takes exception to the Proposed Order’s findings on the prohibition on data sharing, revocation of authorization and third party warrants and seeks clarification of the term “utility compliance” with customer authorization. All of ComEd’s exceptions raise questions about the accountability of non-RES third parties to the customers they purport to serve, given the Proposed Order’s statements about the constraints presented by the scope and record in this docket. All of these concerns need to be addressed by the Commission before individual customer data is shared with any non-RES third party, regardless of the procedural limitations.

ComEd’s exceptions state its objection to the Proposed Order’s conclusion that the data access authorization form that has been the subject of the instant docket is only an agreement between the customer and the utility because, as it is “...a form that a customer must sign for a utility to release personal data and it is not a contract between a customer and a third party, it is not, by itself, enforceable against third parties.” ComEd BOE at 5, citing Proposed Order at 8.

The People believe that the implications of this statement could be misinterpreted to place enforcement of the terms and conditions included in the authorization form on the utilities. We understand ComEd’s objection to this statement to be well-founded for variety of reasons. First, in two separate dockets, the Commission articulated its intention that enforcement was not the duty of utility companies. In the first data access docket concerning the dissemination of

aggregated, anonymous customer data, ICC Docket No. 13-0506, the Commission directed that utilities “not bear the burden of interpreting the scope of consent obtained by suppliers, including physically receiving and reviewing written customer authorizations, or be required to demand proof of individual customer authorization prior to releasing interval usage data.”<sup>1</sup>

This view was reinforced in a subsequent docket addressing how alternative retail electric suppliers were to obtain customer authorization for the release of individual usage data. In Docket No. 14-0701, the Commission reiterated the position it adopted in Docket 13-0506:

The Commission holds that the approved language herein will be standardized so as to relieve the utilities of the responsibility of interpreting the scope of consent obtained by the RESs. The use of standard language will eliminate the need for a utility to evaluate alternative authorization language on an ad hoc or case-by-case basis, thereby conserving resources and removing any potential for confusing or conflicting interpretations.<sup>2</sup>

The Commission’s affirmative decision that standardized authorization language was needed was driven by the presumption that utilities would not be charged with oversight of the authorization process for individual or even aggregated data release.

Second, we also agree with ComEd that the customer’s informed consent is not possible without adequate disclosure from the third party non-RES to the customer on how the data will be used. ComEd BOE at 2. The People further agree that the responsibility to disclose any condition of access to customer data lays with the third party non-RES and note that placing the burden of notice to the customer on the utility is contrary to the Commission’s findings in Docket No. 14-0701 that proscribe the imposition of supervisory responsibilities over non-RES third parties on the utilities. Proposed Order at 2-3, citing Docket No. 14-0701, Final Order at 5.

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<sup>1</sup> Illinois Commerce Commission, On Its Own Motion, *Investigation of Applicability of Sections 16-122 and 16-108.6 of the Public Utilities Act*, Docket No. 13-0506, Final Order, January 28, 2014 at 27.

<sup>2</sup> Illinois Commerce Commission, On Its Own Motion, *Investigation of Standard Terms for Customer Authorization of Access to Interval Usage Data for Non-Billing Purposes*, Docket No. 14-0701, Final Order (April 1, 2015) at 5.

The People observe that the Proposed Order's statement may unfortunately be interpreted to imply that it is the utilities, and not the third party non-RESs, that are in charge of the authorization process, exactly the role that previous Commission orders said utilities should not assume. Perhaps this was an unintended result, but the fact is that previous statements by the Commission are consistent with the principle, as stated in two other data access contexts, that whatever authorization process is used to execute a customer's wish to transmit usage and billing data from a utility to another entity, the utility is not to be burdened with enforcement duties.

We would also agree with ComEd that the possibility of customer confusion over the control of customer data once access has been authorized must be avoided. ComEd BOE at 3. The post-release control of customer data by the non-RES third party is part of the customer-third party relationship, not the customer-utility relationship, and must be managed by the third party non-RES. The utility is a merely a conduit to enable the customer to afford access to his or her data to designated parties (except to the extent that third party non-compliance with the terms and conditions leads the utility to appropriately terminate access). The utility should not be exposed to liability due to the bad acts of others.

The People appreciate that ComEd has pointed to an otherwise overlooked ambiguity in the authorization language, which informs the customer that a third-party non-RES cannot "...sell or license my electricity usage information to any other party for any other purpose....," The suggestion is that the sale or licensing of electricity usage information can take place for the antecedent purpose set forth in the blank line describing the "sole" purpose of the data access. We agree that no third parties can be permitted to sell or license customer data, as was determined in Docket No. 14-0701 for RESs. The same prohibition should exist here for non-

RES third parties. We endorse ComEd's proposed modification to the authorization form, as it appears on page 3 of Appendix A to ComEd's BOE in this regard.

In discussing the unique situation in which the Commission is faced with policing the actions of third parties over which jurisdiction has not yet been decided, ComEd points out that the Proposed Order asserts that the authorization does not represent an agreement between the customer and the third party, but rather does nothing more than "...protect[s] the utility from liability for releasing customer information that it otherwise is required to protect." ComEd BOE at 5-6, citing Proposed Order at 14. ComEd concludes from this reasoning that "...the Proposed Order as currently written goes too far in drawing this distinction by judicially declaring the customer and Third Party are in a *non-contractual* relationship stemming from a non-binding authorization agreement. ComEd BOE at 6 (emphasis in original).

The People note that the terms of the authorization address the actions of the non-RES third party once the utility has provided access to the data. Other than reciting the customer's direction to the utility to release his or her data, the authorization form does not speak to any utility duties or responsibilities once the data is released. Specifically, the Proposed Order cites the need to construct the authorization form in a manner that reflects limitations on how non-RES third parties can use customer data given the context of Section 16-108.6 of the Public Utilities Act. 220 ILCS 5/16-108.6. The Proposed Order recites with particularity how the authorization form should function to protect customers by reflecting the customer's understanding of the conditions under which a non-RES third party will be granted access to the customer's data. Those conditions include a prohibition on the sale of customer data for any purpose, the length of time that data can be held, and how revocation of authorization of a non-RES third party will take place. Proposed Order at 7-8, 8-13, 13-15.

But these specific protections collapse in the face of the statement that the form is “not enforceable against third parties.” How does the authorization form protect the utility if the terms and conditions contained in the authorization cannot be enforced against parties that have violated those terms? Despite the attempts to protect consumers, the Proposed Order may have reached a conclusion about enforceability that points in the opposite direction of its otherwise laudable intentions. The People concur with ComEd that the Proposed Order goes too far when it declares that the terms and conditions contained in the authorization form cannot be enforced against the non-RES third party. In fact, the authorization form describes conditions to and limitations on the use of the data to be imposed on the non-RES third party, *not on the utility company*, notwithstanding that they are described in a form being presented to the customer’s utility company.

In light of ComEd’s arguments, the People now take issue with the Proposed Order’s suggestion that the authorization form “...protects the utility from liability for releasing customer information that it otherwise is required to protect.” Proposed Order at 14. We question how this statement can be reconciled with the Proposed Order’s pronouncement about the authorization form not being enforceable against non-RES third parties. Deeming the protections contained in the form “unenforceable” could easily be interpreted to support a contrary interpretation: if the terms are unenforceable against a non-RES third party, and the non-RES third party is not to be held accountable for the terms and conditions contained in the authorization form, it may lead to consumer complaints alleging that it is the utility that is responsible for any damages the consumer may have suffered – due to the sale of customer data, for example – however unculpable it might be in reality.

Seemingly, the Proposed Order, if adopted by the Commission, would leave the utility vulnerable to customer redress for having violated the conditions of release, since, according to the regulator, they cannot be enforced against the third party non-RES. The Commission should avoid such a result. And in fact, as ComEd points out, the Proposed Order seems to have already inexplicably shifted accountability to the utility company when it refers to the “the utility’s compliance with this authorization...”. Proposed Order at 16. As the People have explained above, it is the non-RES third party’s actions that are subject to conditions following the release of customer data, not those of the utility. The People therefore recommend deleting the last sentence in the second paragraph under section III. F. 4 of the Proposed Order on page 16, starting with the words “Also” and ending with the word “report.

The Proposed Order’s reasoning may rest on the unexpressed assumption that the terms and conditions contained in the authorization form will be contained in the contract between the non-RES third-party and the customer, and accountability will follow. That may be a reasonable assumption. But if that is the case, a declaration from a regulatory body that the terms and conditions contained in the data authorization form themselves are “unenforceable” with respect to non-RES third parties is especially unfortunate. The Commission should avoid ambiguities that could create problems for consumers who may want to seek legal redress against non-RES third-party bad acts by trying to enforce those very same terms and conditions.

Finally, the People agree with ComEd that if the Final Order itself observes that the issue of the Commission’s jurisdiction over non-RES third-parties is not yet settled, then it is inconsistent to assert the issue of jurisdiction in any context. For all these reasons, we agree with ComEd and strongly recommend that the language starting at the bottom of page 7 with the



words “The Commission is constrained” and continuing to page 8, ending with the words .”...against third parties.” should be stricken from the Proposed Order.

B. Reply to Ameren

Ameren’s Brief on Exceptions, like those filed by ComEd, note the particular dilemmas presented by the Proposed Order as representing a “fundamental shift in the paradigm that was envisioned by most of the parties to the case”. Ameren BOE at 2. It identifies as an overarching two-fold problem the Proposed Order’s findings that (1) the authorization form is a contract between utilities and customers and (2) the warrant process, which Ameren describes as “fundamental to the Green Button implementation,” should be resolved in the 14-0507 docket. Ameren BOE at 4-5.

The People believe Ameren to be correct in asserting that since it is the non-RES third party that is seeking the customer’s information and since it is the customer who must authorize the release of that information, the burden to administer the processing of authorization forms must be the non-RES third party. AIC BOE at 6. This approach is consistent with the Commission’s directive that the utility be spared the duty of interpreting the scope of consent or evaluating individual authorizations on a case-by-case basis, as explained in our response to ComEd’s exceptions above. Ameren also pointed out that as the utility holding customer usage information, it anticipated that the authorization form and the Green Button process would work concurrently, or at least would create redundancies designed to enhance consumer protection. AIC BOE at 3. But as Ameren points out, issuing a Final Order in this case while deferring the Green Button issues to another docket, makes practical implementation of data release impossible, as a utility cannot incorporate the participation of non-RES third parties in the Green Button process until the warrant issues that Ameren describes as “fundamental” to Green Button implementation are resolved. Ameren BOE at 4-5, 7-9.

Finally, Ameren reiterates Com Ed's concern that the Commission refrain from making any pronouncements about Commission jurisdiction. Ameren BOE at 10. Where the Proposed Order explicitly states that the jurisdiction issues concerning non-RES third parties have not been briefed, Proposed Order at 31, the People agree that declarative statements on the topic are inappropriate.

Ameren states that if the Commission intends, as the Proposed Order seems to indicate, to delay a decision on the warrant process, finalizing and closing the instant docket makes little practical sense. Accordingly, Ameren has suggested the following procedural options: 1) resolve warrant and Green Button issues in this docket; (2) stay further consideration of the instant docket until Docket 14-0507 is resolved; or (3) expressly condition any final order or the sharing of data with non-RES third parties on the resolution of Docket No. 14-0507. Ameren BOE at 5.

The People support Ameren's request to stay these proceedings until the unresolved issues deferred to Docket No. 14-0507 (and including the Commission's appropriate jurisdiction over non-RES third parties and their possible role in a comprehensive Green Button process) are resolved, either in that docket or in another suitable proceeding.

### C. Reply to ICEA

ICEA observes that the Proposed Order acknowledges that notwithstanding its approval of the Green Button process, several issues connected to non-RES third parties' treatment of customer usage data, remain unresolved. ICEA BOE at 2, 3. In view of that circumstance, ICEA requests that the Commission complete its consideration of Docket No. 14-0507 prior to issuing findings and conclusions in the instant docket, proposing that "...non-RES third parties cannot approach ComEd and Ameren with requests for customer interval data the day after the Final Order in this docket, but instead once a full, formal program is developed and approved by

the Commission.” ICEA BOE 3-5. The People agree with ICEA’s observation that restrictions on the usage of interval data, as well as enforcement of those restrictions as they pertain to non-RES third parties, need to be defined before any sharing of data with non-RES third parties can occur. This view is consistent with that of Ameren, as described in this brief *supra*, and supported by the People in this Brief.

The People also support ICEA’s proposal that the issue of Commission jurisdiction over non-RES third parties must be resolved, if not in the instant docket, then in Docket 14-0507 or some other appropriate proceeding. Not only the efficacy of the Green Button process but the enforceability of unregulated third party data access remains in limbo until that issue is addressed.

#### D. Reply to CUB/EDF

CUB/EDF take exception to the Proposed Order’s 24-month limit on the duration of the data access authorization, advocating instead that the length of time that a third party non-RES can use that information should be up to the customer. CUB/EDF BOE at 2-3. They also except to a lack of clarity in the Proposed Order on what the Commission expects from further consideration of the warrant process in a separate docket. CUB/EDF BOE at 4-6.

The People disagree with the first of these exceptions, but grant that the scope of any further consideration of the warrant process needs to be clarified.

#### E. Reply to Mission:data Coalition

Mission:data urges the Commission to define the term “small business” customers in order to exclude those customers from the 24-month authorization term limit. Mission:data BOE at 2-3. Mission further requests that the Commission specify authorization language for non-residential customers. Mission:data BOE at 3.

Additionally, Mission:data challenges the Proposed Order's conclusion that it lacks sufficient evidence to rule on whether a warrant process should be permitted. Mission:data states that the warrant process can ensure the authentic reflection of the customer's authorization by "...simply asking the third party to provide unique identifying information of the customer," which Mission claims "could be *more* extensive than those required to create an account on the utility's website". In response to the claims of other parties that a warrant process cannot guarantee the authenticity of the customer's authorization, Mission:data further states that requiring "multiple unique piece of corroborating identifying information of a customer..." would resolve that problem. Mission:data BOE at 3-4. It urges the Commission to amend the Proposed Order to permit for a third-party led authorization process. Barring that, it urges the Commission to rule on the feasibility of a warrant process in Docket 14-0507. Mission:data BOE at 4.

The People believe the issues to be raised by Mission:data to be more appropriately considered in further proceedings concerning the warrant process.

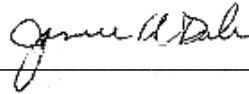
### **III. Conclusion**

For all the reasons set forth above, the People urge the Commission to modify the Proposed Order consistent with the arguments set forth in their Reply Brief on Exceptions and stay the proceedings in this docket. The People further request that the Commission address in a separate proceeding the unresolved question of Commission authority over non-RES third parties, the implementation of the Green Button process as it might apply to non-RES third

parties and any other matters that the Commission concludes have not yet been properly decided. Only upon resolution of those undecided issues should the Commission issue a Final Order in the instant proceeding.

Respectfully submitted,

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Lisa Madigan, Attorney General

A handwritten signature in cursive script, appearing to read "Janice A. Dale", is positioned above a horizontal line.

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